The Court of Appeal for Bermuda

CRIMINAL APPEAL No. 15 of 2017

B E T W E E N:

SHAYNE JAMES

Appellant

-v-

THE QUEEN

Respondent

Before: **Baker, President**
Bell, JA
Clarke, JA

Appearances: Elizabeth Christopher, Christopher's Barristers & Attorneys Ltd., for the Appellant
Larry Mussenden and Karen King-Deane, Office of the Director for Public Prosecutions, for the Respondent

Date of Hearing: **13 & 14 March 2018**

Date of Judgment: **23 March 2018**

JUDGMENT

Non-compliance with the provisions of the Disclosure and Criminal Reform Act 2015 – consequent prejudice and fairness of trial

BELL, JA

Introduction

1. This appeal is taken by the Appellant ("Mr James") against his conviction in the Supreme Court on 19 September 2017 of two counts, the first being handling a firearm, in the form of a homemade lethal barrelled weapon from which a bullet could be discharged, contrary to section 19A of the Firearms Act 1973, and the

second being the discharging of a bullet from such firearm, contrary to section 4 (1) of the Firearms Act 1973.

2. The case is of particular significance since there are complaints in relation to the discharge of the prosecutor's duty of disclosure pursuant to sections 3 and 4 of the Disclosure and Criminal Reform Act 2015 ("the Act"). This is the first time that this Court has been asked to consider the provisions of the Act, and the nature of the particular duties owed on both sides when the process of preparing for the trial of a criminal case in the Supreme Court gets under way. The position is complicated by reason of the fact that while the Act provides for regulations to be made by the Minister responsible for legal affairs relating to the matters referred to in sections 3(1)(d) and 5(2)(e) of the Act, no such regulations have in fact been made. Section 3(1)(d) of the Act provides that the prosecutor shall serve on the accused person in matters that are triable on indictment only "such other particulars or material as may be required under regulations and which reasonably relate to disclosure by the prosecution". Section 5(2)(e) of the Act concerns the duty upon an accused person to provide a written statement "containing such other particulars or material as may be required under regulations and which reasonably relate to disclosure by the defence".

3. Section 15 of the Act also provides that the Chief Justice may make rules under section 540 of the Criminal Code Act 1907 for carrying the Act into effect, but no such rules have been made. However, by circular #3 of 2017 dated 27 January 2017, the learned Registrar issued comprehensive Guidance Notes regarding the obligations on both prosecution and defence in the conduct of criminal trials, which covered various acts and rules, including the Act. The guidance notes included details of the appropriate forms to be used, but these forms are expressly stated to be for use in respect of criminal matters sent from the Magistrates' Court to the Supreme Court on and after 30 January 2017. This case preceded that date, so that in strict terms it is not compulsory to follow the forms provided for in the guidance notes. But since the Act provides for various procedural steps to be taken in preparation for trial, it makes obvious good sense to use the forms contained

within the Registrar's guidance notes. I will come in due course to the application of the relevant disclosure provisions insofar as they relate to the underlying facts of this case.

The Background Facts

4. On 29 August 2016, Mr James was at a location on Rambling Lane in Pembroke Parish, when he sustained a bullet wound to his left hand, caused by a bullet entering between the fourth and fifth fingers of his hand, from the palmar side to the back of the hand. The Crown's case was that Mr James was handling a homemade firearm comprising several parts, including a silver pipe or barrel, a large circular cylinder, which had come from a socket set, of the type which might be purchased from any hardware store, a slide mechanism which contained a bolt with a firing pin on the end of it, and a spring. The Crown's case was that this homemade firearm was difficult to operate and required two hands to make it work. Further, the Crown's case was that in handling the homemade firearm, Mr James had caused it to fire such that it discharged a bullet which had then travelled through Mr James' left hand, exiting the back of his hand at the base of the fourth and fifth fingers.

5. The contrary case for Mr James was that he had been at the location in question when an unidentified shooter had approached him. Mr James' case was that he had put up his hands by way of defence and had been shot in his left hand. Mr James was taken to the hospital (KEMH) by a neighbour, and at KEMH was treated by Dr ELB Hodgson-Harford ("Dr Hodgson"). Dr Hodgson was a physician in private practice, specialising in plastic surgery. She prepared a report of the surgery she had performed, headed Operative Surgery, which was retained in the files of the Bermuda Hospitals Board. The operation itself took place on the day of the incident. In her description of the operation Dr Hodgson noted the following:

> *"Small particulate matter was located in the wound, but no large foreign body was seen or found. The palmar side of the wound showed heat damage with blackening on the edges of the wound".*

6. In her case notes, Dr Hodgson made sketches of the hand, showing where there was burned skin on the palmar side, and a soft tissue defect and ragged skin on the back of the hand. Dr Hodgson's notes recorded that she was told by the patient (Mr James) that the wound was defensive, that he had held his hand up to protect his face and was shot at close range.

7. It is no doubt convenient to deal at this point with the manner in which the medical records were obtained. Dr Hodgson had provided a medical report dated 16 October 2016, which had been served on the defence, as I understand it, in late 2016. I will come back to the question of the various directions hearings which took place and will at this time just deal with the medical position with particular reference to the photographs which Dr Hodgson had taken at the hospital before treating Mr James.

The Photographs

8. At approximately 4.00 p.m. on 5 September 2017 (the trial started on Monday 11 September 2017) Ms Christopher sent an email to Mr Mussenden and Ms King, in which she asked the following: "Were photographs taken of our client at the hospital? Of his injury? Please advise. As we have the doctor's report, we should be provided with all medical notes and any such photographs".

9. Mr Mussenden's response email, later that same afternoon said: "James' injuries were not photographed at KEMH. The Defendant would have to sign a waiver for the BPS to obtain any medical notes. Otherwise, he can attend KEMH and retrieve them himself or sign a waiver for you to do so". Mr Mussenden advised in the course of his submissions that he had explained to Ms Christopher that it would likely result in quicker production of the hospital notes if she were to obtain the appropriate waiver from her client and attend KEMH to secure the notes, which is what in fact happened. As to the statement that Mr James' injuries were not photographed at KEMH, Mr Mussenden explained that in this regard he was talking about police photographs; he was unaware that Dr Hodgson had taken any photographs, although as he pointed out, the existence of the photographs was

something of which Mr James would have been aware, which he suggested was why Ms Christopher had asked the specific question in relation to photographs in the first place.

10. Dr Hodgson gave her evidence on Wednesday 13 September 2017. During the course of her evidence in chief, she tendered two photographs which she had taken at KEMH before operating on Mr James. Mr Mussenden's position was that the Crown had become aware of the existence of the photographs (which apparently had not been a part of the KEMH record) only a little earlier on the afternoon of 13 September, and those photographs had been emailed to Ms Christopher at 2:09 p.m. on 13 September 2017, very shortly after the Crown had become aware of their existence.

11. Ms Christopher placed particular emphasis on the relevance of the photographs, as part of her complaint of prejudice to Mr James and the consequent unfairness of the trial, on the basis that the blackening shown on the palm side photograph represented a deposit of soot, and accordingly was something of particular significance to her firearms expert, Ann Kiernan.

The Police Enquiries

12. Returning to the background narrative, the police attended at KEMH and questioned Mr James in regard to the wound he had sustained. Thereafter they attended at the scene of the incident, where they discovered the homemade firearm lodged in a banana tree, a spring on the ground and a trail of what was believed to be Mr James' blood on two concrete areas reasonably close to the banana tree. The homemade firearm was swabbed by the Police for DNA purposes, and it transpired that the major donor to the DNA swab from the inside of the homemade firearm matched Mr James' DNA. Mr James also had significant quantities of GSR on his right hand, such that the judge in his summation described his hand as being "bathed in particles", which he pointed out must have come from this shooting on the day in question.

The Grounds of Appeal

13. The first ground of appeal was that the learned trial judge had erred in failing to adjourn Mr James' trial, notwithstanding the application of counsel. This, it was said, was unfair, and led to Mr James being prejudiced. The complaint is that the Crown had failed to comply with the provisions of the Act, particularly insofar as no notice had been given under sections 3 and 4 of the Act until such time as the prosecution had served Form 1, something which had not occurred until 5 September 2017. Ms Christopher made complaint that the late notice under sections 3 and 4 of the Act was particularly egregious since the Crown relied on expert evidence as part of its case. Accordingly, she submitted, there was no signal until very late in the day as to the time by which the prosecution had completed its disclosure, and this was said to have hindered Mr James and his legal team in the preparation of his defence and the instruction of his expert firearms witness Ms Kiernan.

14. The second ground was that the firearm had not been test fired by the prosecution with the spring found at the scene until 5 September 2017, and a notice of additional evidence indicating that this test firing had been unsuccessful had not been served until the evening of 6 September 2017. This, it was said, hindered Ms Christopher in the preparation of Mr James' defence and in the instruction of the expert witness.

15. The third ground covered the specific request made by the defence for the medical records. Complaint was made that nothing had been disclosed by the prosecution before trial, which seems to have been the case. It was Ms Christopher who had secured the medical notes, and it was not until Wednesday 13 September 2017, that she was able to forward copies of these notes to Mr Mussenden and Ms King.

16. The fourth ground related to the late delivery of the two photographs which had been taken by Dr Hodgson, and Ms Christopher maintained that this was particularly unfair given that the trial judge had not been prepared to adjourn before the item was allowed in. I pause to mention that the Crown had not been

aware of the existence of the two photographs when the application to adjourn was made. The ground of appeal contended that the photographs had implications for Mr James, as they were relevant to the issue of whether the firearm was being held by Mr James at the time that the bullet was discharged, the Crown case, or whether Mr James had raised his hand (or hands) in self-defence to a shot being fired by some third party, his case.

17. Fifthly, complaint was made that Mr James' firearms expert had been cross-examined by the Crown at a time when she was said to have had less than full information about the forensics, on the basis that one of the photographs showing some blackening at the bullet's entry point had significance.

18. The sixth and seventh grounds were not proceeded with, and the eighth ground was that the learned judge had wrongfully purported to give what was described by Ms Christopher as "trajectory evidence", making a demonstration to the jury of the position of Mr James' hand (or hands) at the time of the shooting, during the course of the his summing up. This demonstration, it was contended, failed to match the demonstration given by Mr James when he was in the witness box.

19. The last of the grounds of appeal related to the manner in which the learned trial judge had referred to defence counsel's yardstick for deciding the issue of certainty in regard to the standard of proof and the burden on the prosecution. Defence counsel had used the examples of betting one's last $50 on a "certainty", or the way a person might feel at the start of a marriage, only to find his or her optimism misplaced.

Findings in Regard to the Grounds of Appeal

20. Ms Christopher indicated that in practical terms, grounds 1 through 5 could be run together. It was the totality of the prosecution's conduct which she maintained was unfair and which had led to prejudice to Mr James. No doubt it will be helpful at this stage to go through the chronology of matters and determine the extent to

which there was a failure of disclosure, and if so whether the prosecution's conduct in that regard had led to unfairness and prejudice to Mr James.

21. The starting point is that on 12 October 2016, the learned Registrar issued the indictment detailing the statement of offence and particulars of offence in respect of counts 1 and 2. Then, on 24 October 2016, the Crown's case was served on defence counsel. This included some twenty documents, many of which were witness statements. The first item was the statement of Dr Hodgson, and it should be noted that this document had been prepared by Dr Hodgson, and does not bear the hallmarks of a typical police statement involving question and answer. Later in 2016 the trial bundle was filed with the court and served on the defence, and on 28 October 2016, the first of a number of notices of additional evidence was given.

22. Nothing then appears to have happened until some ten months later, when on 31 August 2017 defence counsel wrote to the Crown, with a request for some specific disclosure. It should be noted immediately that this substantial period, until less than two weeks before the trial was due to start, drove a coach and horses through the regime which the Act was designed to implement. For instance, section 5 of the Act provides that, assuming compliance by the prosecutor with his obligation to disclose his case pursuant to section 3, and to disclose unused material, as provided for in section 4, then an accused person has a 28 day period within which to serve a defence statement on the prosecutor and the court. With the trial less than two weeks away, it is obvious that the procedure envisaged by the Act could not be complied with. In this regard I take the view that in considering where the blame lay for the failure to comply with the requirements of the Act, the finger cannot be pointed solely to the defence, which seemed to be the implication of Mr Mussenden's submissions. The email of 31 August 2017, which essentially initiated preparation for trial, had brought a prompt response from Mr Mussenden, in which he closed by pointing out to Ms Christopher that her request could have been made at a much earlier time. Ms Christopher's response was immediate, and said that while her first email of the day was couched as a request, it was really a reminder that the Crown had always had an obligation to disclose, and this no

doubt was a reference to the provisions of sections 3 and 4 of the Act. While section 3(1) of the Act details the matters which need to be served by the prosecutor, section 3(3) imposes an obligation on the prosecutor to write to the accused person and the court "notifying them when he has complied with his duty under this section". So this effectively imposes on the prosecutor a duty to notify the accused that he does have all of the relevant material. It may very well be that if the Crown had complied with its disclosure obligations at a much earlier date, defence counsel might still have focussed on trial preparation only at a date much closer to the start of the trial. That is beside the point; the requirements of the Act have to be complied with, and within the timeframe provided for in the Act. Accordingly I would hold to the view that while there seems to have been fault on the part of the defence in relation to the late start to preparation for trial, the primary failure lay with the Crown, because under the Act, the Crown had the obligation to set matters in motion by the service of a document indicating compliance with section 3 of the Act.

23. But matters do not stop there. As well as material which is disclosed and relied upon by the Crown, there is an obligation on the prosecutor to disclose unused material, by reason of section 4, and this obligation extends to disclosure of "any relevant unused material in the possession of the police or prosecutor which has not previously been disclosed to the accused person". In the alternative, the obligation of the prosecutor is to give to the accused person a written statement that there is no material of a description mentioned in the previous paragraph. There is also an obligation on the prosecutor to write to both the accused and the court notifying when he has complied with his duty in this section.

24. In any event, Ms Christopher sent a further email late on 2 September 2017 with queries in relation to other aspects of pre-trial preparation, and Mr Mussenden responded to that on the late morning of 3 September 2017. At that point there remained questions as to whether the GSR expert needed to attend trial, whether there was any dispute as to the DNA found on the weapon, and whether there was

any dispute in regard to the Crown's contention that the homemade weapon was indeed a firearm for the purposes of the Firearms Act 1973.

25. As previously stated, Form 1 was then filed and served on defence counsel on 5 September 2017, and on that same date there was a mention hearing before Simmons J. Matters in issue relating to trial preparation were canvassed before the judge, and there was a further mention date, also before Simmons J on the following day, and finally there was a mention hearing before the trial judge, Greaves J, on 7 September 2017. The court was updated on disclosure, there was a further request for clarification on the issues in relation to GSR, DNA and firearms, and defence counsel made a submission requesting that the trial should be adjourned. The learned trial judge rejected that request, indicating that defence counsel had had sufficient time to prepare the defence and that he would select a jury on Monday 11 September 2017. Notice of additional evidence was also provided on that day, including a statement by the Bermuda Police firearms expert, PC McNab.

26. The trial started on 11 September 2017. There were further notices of additional evidence provided, and the defence served the expert report of its firearms examiner Ms Kiernan.

27. The trial continued until the Crown closed its case on 14 September. Mr James gave his evidence on that day, and following that evidence defence counsel made submissions to the judge in regard to the test firing of the firearm with a live round. The position of the Commissioner of Police was that he would not allow the test firing of a live round in the homemade firearm.

28. On Monday 18 September 2017, defence counsel made submissions for Ms Kiernan to test fire the homemade firearm, and immediately following those submissions the trial judge issued a ruling, in which he said …"I have looked at the report of the evidence of the expert for the Crown, and I hold the view that no live round should be fired in that firearm. In my view it is likely the risks of

destroying the exhibit at this point is too much, is too great". The learned judge was in any case of the view that it did not add anything to the defence case to have a live round fired in the homemade firearm. That view on the judge's part was prescient, because in the event, even firing with the primer only caused the homemade firearm to be rendered inoperable.

29. Ms Kiernan gave her expert evidence later that day, following which the defence closed its case. The judge gave his summation the following day.

30. Against that background, the first matter to be considered is the trial judge's unwillingness to accede to the defence request to adjourn the trial. Such matters are clearly within the province of the trial judge, and the ultimate question is whether the judge's refusal to grant the adjournment sought caused prejudice to Mr James and his counsel in their trial preparation. This is very much tied in with the matters dealt with below, and I would propose to deal with the issues together, as counsel did.

31. It is clear that there was a failure on the Crown's part to comply with its disclosure obligations under the Act, but the question which follows is whether such failure caused prejudice to Mr James such that the trial was unfair. In this regard, the thrust of Ms Christopher's argument was that had Ms Kiernan been shown the photographs, and particularly the one which showed blackening of Mr James' hand at the place where the bullet had entered, Ms Kiernan would have appreciated that this was caused by the discharge of soot from the muzzle of the firearm, and she would then have been able to conduct further tests which, it was submitted, would have added weight to Mr James' version of events.

32. I do not understand that argument. Ms Kiernan's evidence contained diagrams showing how, as one would expect, the plume of soot which escapes the muzzle on the discharge of a firearm, spreads out the further it goes. At the same time, self-evidently, that could be the case whether the firearm was discharged close to Mr James' hand by the third party shooter, or if it was discharged accidentally by Mr

James from a like distance away from his hand. Ms Christopher took the view that the distance between muzzle and hand had been under 18 inches. I do not follow how this evidence would do anything to identify whether the shooter of the firearm had been a third party or Mr James himself.

33. It was also Ms Christopher's contention that the tests which Ms Kiernan planned to carry out would have been circumscribed by the presence of the soot. That too is beyond me. Leaving for the moment the fact that the trial judge was, understandably, not prepared to allow the testing of a live bullet in a homemade firearm, I do not follow how it is suggested that the presence of soot on Mr James' hand, as opposed to the burning which was described in Dr Hodgson's report, would cause Ms Kiernan to wish to conduct a different type of test than she might previously have had in mind, or indeed the relevance of any such test to the critical question of whether the shooter was Mr James or some other person.

34. Ms Christopher also made reference to the tests which Ms Kiernan wished to conduct taking place with a cloth covering the muzzle of the firearm. I would expect the presence of a cloth to inhibit the formation of a plume of soot, and it was never made clear, despite questioning from the bench, why it was said that this test could have had any significance.

35. It follows, in my view, that the Crown's failure to comply with the provisions of the Act did not cause prejudice to Mr James or lead to his trial being in any way unfair. I would therefore dismiss these five grounds of appeal.

36. The next ground, the eighth, relates to the so-called trajectory evidence. The trial judge did not understand the context of that expression, and I regard it as inapposite. But the real problem for this Court is the one identified by the judge. The issue was the manner in which Mr James had held up his hand to demonstrate how he said he had held it when he put his hand up defensively the moment before the shot was fired, and the judge's description of that act in his summation. There were issues as to whether Mr James had held up one or both hands, and whether

the one hand was the left or the right. The judge was not prepared to bring the jury back for the issue to be clarified as Ms Christopher wished, not least because his recollection of events differed from that of Ms Christopher. Ms Christopher maintained that Mr James had, in his evidence demonstrating his actions at the time of the shooting, put up both hands, whereas the judge clearly indicated during this exchange with counsel that Mr James had put up his right hand, and only his right hand, on a number of occasions during the course of his evidence. On the first occasion that the issue had been brought up by Ms Christopher, the judge pointed out that he could hardly demonstrate Mr James' actions to the jury using his left hand, when Mr James had used his right. Mr Mussenden had said immediately, when the judge said that he had put up his own right hand because that was what he maintained Mr James had done, that "That's what he did." The debate between counsel and judge continued, with the judge pointing out that he was better placed than Ms Christopher to see what Mr James had done (as Mr Mussenden would have been), and that in any event the jury would have seen Mr James' actions quite clearly. The judge understandably rejected the use of the term "trajectory evidence".

37. I do not see how this Court can accept the submissions of counsel on a matter such as this when it had been canvassed fully before the judge in the absence of the jury, the judge was adamant as to what he had seen ("I'm sitting here. I told you I saw what he did"), and the judge's version of events was borne out at the time by Mr Mussenden. I would dismiss this ground of appeal.

38. The last ground of appeal related to the language used by Ms Christopher in her final address to the jury, which the judge had corrected during his summation. Ms Christopher maintained that counsel in this jurisdiction frequently used analogies to describe the appropriate yardstick, and submitted that the learned judge had undermined her entire closing in the face of the jury by the manner in which he chose to deal with the issue.

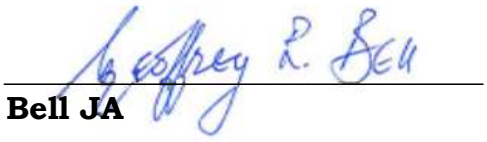
39. With respect to counsel it seems to me that even if the judge were to be wrong, such a submission goes way too far. But this is quite apart from the fact that I think the judge was absolutely correct to steer the jury away from examples such as the ones given by Ms Christopher. The judge had already given the jury the usual wording regarding the standard of proof which the prosecution needed to attain. The judge regarded it as dangerous, as do I, to measure certainty against matters such as betting and marriage. As he said regarding betting "You might be sure about something, but as soon as somebody starts to introduce money and wants you to put up your money, you start wavering". People take very different views as to their willingness to wager on an issue, whether the amount of the wager is their first $50 or their last. And as to marriage, the judge described that as "a funny thing to judge anything by", a sentiment with which I also agree. If Ms Christopher felt that the judge's insistence on adhering to more normal descriptions on how to address the issue had undermined her closing in any way, she has only herself to blame. I would dismiss this ground of appeal.

Summary

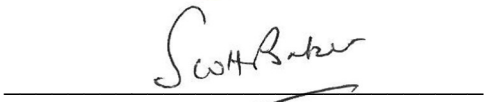
40. It follows that the appeal should be dismissed, and I would so order. I would just add the comment that the combination of the DNA and GSR evidence was obviously very powerful, so that Mr James' conviction could be said to have been on the basis of very strong evidence.

Postscript

41. As indicated at the outset of this judgment, this is the first case on which issues of compliance with the Act have arisen. Hopefully the Registrar's most helpful guidelines will now be given the force of formal rules, and no doubt this case has demonstrated to all concerned, and particularly to the Crown, the need to comply with the provisions of sections 3 and 4 of the Act. Such compliance will in turn lead to the imposition of an obligation on the accused and his counsel, on which there should similarly be full and timely disclosure. The one thing that is clear is that there is a need for co-operation on both sides if the Act is to work effectively.



Bell JA



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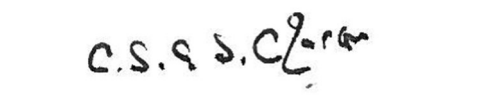

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